Supreme Court, U.S.
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No. 03-257

In The Supreme Court of the United States

FIDELITY EXPLORATION & PRODUCTION COMPANY,

Petitioner,

v.

NORTHERN PLAINS RESOURCE COUNCIL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF TONGUE & YELLOWSTONE RIVER IRRIGATION DISTRICT AND TONGUE RIVER WATER USERS' ASSOCIATION OPPOSING THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the discharge into a navigable river of highly mineralized groundwater generated from natural gas production, causing the addition of pollutants to waters of the United States, requires an NPDES permit under the Clean Water Act.

2. Whether the case herein presents any questions of law similar to those presented by *South Florida Water Management District v. Miccosukee Tribe of Indians*, No. 02-626.

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INTEREST OF *AMICI CURIAE*

Amici curiae Tongue & Yellowstone Irrigation District and the Tongue River Water Users' Association respectfully submit this brief in opposition to the Petition for Writ of Certiorari.[1] Written consent for *amici curiae* participation in this case was granted by counsel of record for the parties.

Amicus curiae Tongue & Yellowstone Irrigation District (hereinafter "T&Y") is the holder of the oldest major water right on Montana's Tongue River, into which Fidelity Exploration & Production Company discharges its coalbed methane wastewater. The Tongue River flows north from the Montana-Wyoming border until it joins the Yellowstone River, southeast Montana's largest waterbody, which eventually joins the Missouri River just inside the North Dakota border. T&Y's water right dates from 1886, when the first diversion dam was built by local businessmen who knew agriculture could not thrive without water, and Miles City could not survive without agriculture. That truism has not changed in 117 years.

Miles City is 145 windswept miles east of Montana's largest city, Billings. With a population of about 8,500, Miles City is one of Montana's larger towns. T&Y's Twelve-Mile Dam, as it is known, diverts water from the Tongue River into the T&Y Ditch twelve miles south of Miles City,

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* Tongue & Yellowstone Irrigation District and Tongue River Water Users' Association affirm that no counsel for any party in this case authored this brief in whole or in part, and that no persons or entities other than *amici* or their counsel have made a monetary contribution specifically for the preparation or submission of this brief.

then runs for 27 miles to the Yellowstone River. Along the way, it provides water to 305 irrigators who irrigate more than 9,500 acres in the lower Tongue River watershed. T&Y water irrigates a variety of crops, including alfalfa, corn, sugar beets, and small grains such as wheat, barley and oats, as well as hundreds of family gardens and fruit trees. As long as water is available for irrigation, the area served by the T&Y Ditch is relatively fertile, as it is blessed with long days of sun and relatively good soils.

Amicus curiae Tongue River Water Users' Association (hereinafter "the Association") is a nonprofit corporation comprised of ranchers and farmers. The Association was organized in 1937 to appropriate, buy, market, sell, pump, divert, develop, furnish, distribute, lease and dispose of the waters of the Tongue River and its tributaries, including the return flows and overflows of all water from the river, its tributaries, dams, canals, ditches, etc. The Association sells water to T&Y, for instance, for irrigation. The Association's members depend on the high-quality surface waters of the Tongue River, as well as its many tributaries, for their livelihoods as ranchers and farmers.

SUMMARY OF ARGUMENT

This case pits major oil and gas producers against small-town Montana farmers and ranchers. Unlike many cases in which farmers and ranchers argue against overly restrictive interpretations of the Clean Water Act, *amici* herein believe the Ninth Circuit's decision properly interprets the Clean Water Act and offers them the best hope of protecting their land and their livelihoods. The Ninth Circuit's decision in this case – which simply holds that

the wastewater generated by coalbed methane production is a "pollutant" – accomplishes the very goal Congress intended: It protects the nation's waters from the addition of pollutants that threaten to destroy not only the water upon which farmers and ranchers in southeastern Montana depend for irrigation,[2] but the very soil upon which they live and work. CBM wastewater contains many more minerals than does the water of the Tongue River. Specifically, CBM wastewater is very salty. As described in the Draft Environmental Impact Statement (DEIS) addressing CBM development in Montana, "Sodium causes osmotic stress to plants *and destroys the texture of clayey soils*; these combined effects make sodium content, and especially SAR [sodium absorption ratio], a point of emphasis when gauging impact to water resources from CBM water." Montana Statewide Draft Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans (hereafter DEIS) at 4-19, 4-28, *available at* www.deq.state.mt.us/CoalBedMethane/DraftEIS/DraftPublicEIS.pdf (emphasis added). The Tongue River valley is made up of these "clayey" soils; thus, if *amici* irrigate with water that has elevated sodium and/or SAR, the land they cultivate will lose its ability to sustain plant life. In a region that receives an average of only thirteen inches of rain per year and suffers recurrent drought, the pollution of local rivers

[2] Irrigation is far and away the primary use of water in southeastern Montana, and surface water is far and away the primary source of water for irrigation. Montana Statewide Final Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans at 3-28, available at www.mt.blm.gov/mcfo/cbm/eis/volume1/Chapter3.pdf.

will spell the demise of commercial agricultural operations, family farms, and backyard gardens. This scenario – river pollution and/or the destruction of irrigated soils – will cause direct harm to every irrigator represented by *amici*.

It is worth noting that Montana is a state where water is scarce and frequently fought over. The Tongue River has run at historic lows the past three summers as a result of lingering drought; had CBM water been even marginally usable, Tongue River irrigators would have been able to irrigate more crops, which in turn would have yielded many of them more money. Irrigators rarely, if ever, refuse water someone tries to give them. They refuse CBM wastewater because it is bad for their crops, and bad for their land.

Although CBM development is in its infancy in Montana, it is projected to mature quickly and exponentially. The amount of CBM wastewater that will eventually be generated by CBM production in Montana is staggering. The FEIS addressing CBM development in Montana assumes that up to 26,475 wells will be developed in Montana – a hundredfold increase from the current 250 wells. Montana Statewide Final Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans (hereafter FEIS), Alternatives at 2-25, *available at* www.mt.blm.gov/mcfo/cbm/eis/volume1/Chapter2.pdf. The vast majority of wells will be developed in a 16-county area of southeastern Montana, at the heart of which is Miles City and the Tongue River. FEIS at 1-2 (map at 1-3), *available at* www.mt.blm.gov/mcfo/cbm/eis/volume1/Chapter1.pdf. With each well producing 2.5-20 gallons per minute of wastewater, it is indisputable that full CBM production will result

in a torrent of salty wastewater in need of a place to be discharged. *Id.* at HYD-1, *available at* www.mt.blm.gov/mcfo/cbm/eis/volume2/HydrologyApp.pdf.[3]

Nonetheless, *amici* do not seek a complete ban on CBM production. They seek the protection of federal regulation through the NPDES permitting process. Specifically, they have sought – and obtained – judicial recognition that CBM wastewater is a pollutant under the CWA. Because CBM wastewater is generated as a byproduct of an industrial process and thereafter discarded, it is "industrial waste." 33 U.S.C. § 1362(6); *see also Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546 (5th Cir. 1996). Because CBM wastewater is generated as a result of natural gas production and not reinjected into deep wells, it is "produced water" not exempt from the CWA's definition of pollutant. 33 U.S.C. § 1362(6)(B). Finally, because CBM wastewater contains minerals and metals that are regulated by the EPA as "pollutants" – such as total dissolved solids, sodium, barium, boron, copper, iron, manganese, nickel and zinc – it is a pollutant. EPA's formal determination that these substances are "pollutants" is entitled to judicial deference as long as it is reasonable. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

Fidelity has attempted to cast this "pollutant" case as something it is not – an "addition" case – in order to ride

[3] Fidelity, the only company currently producing CBM in Montana, is permitted to discharge up to 1600 gallons per minute (gpm) into the Tongue River from its 250 wells.

the coattails of *South Florida Water Management District v. Miccosukee Tribe of Indians*, No. 02-626. But this is not *Miccosukee*. This case involves the uncontroverted addition of highly mineralized groundwater, which is not a water of the United States, into a navigable freshwater river which *is* a water of the United States The two waterbodies are complete strangers to one another – or would be but for Fidelity's industrial natural gas production process. Thus, this case bears no similarity to any of the "addition" cases.

This is neither a 101(g) case involving states' ability to allocate water, nor a case in which sufficient deference was not afforded the EPA. It is not a case that presents any split in the circuits, nor any unique question of federal law.

For all of these reasons, *amici* irrigators respectfully urge this Court to deny Fidelity's petition.

ARGUMENT

I. The Ninth Circuit's Decision Is Consistent With Other Circuits' Interpretation of the Clean Water Act.

A. This Case is Completely Consistent with the Only Other Circuit Court Case Involving Produced Water.

The Ninth Circuit's conclusion that CBM wastewater is a "pollutant" is wholly consistent with the only other circuit court case addressing wastewater generated by oil and gas production. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546 (5th Cir. 1996); *see* Pet. App. 9a-11a. There, the defendant oil company was

extracting oil from wells in Galveston Bay, Texas, and discharging the wastewater into Galveston Bay without an NPDES permit. The Fifth Circuit held that an NPDES permit was required because the wastewater was "industrial waste," *id.* at 568; it was "chemical waste," *id.*; it was "produced water" not subject to the pollutant exemption, *id.*; and finally, it contained several substances formally recognized by EPA as pollutants. *Id.* at 568-69.

The Ninth Circuit applied similar reasoning herein, and concluded that CBM wastewater was a pollutant because it was industrial waste, it was produced water not exempted by the statute, and it caused "pollution" of the receiving water. Pet. App. 9a-13a. While Fidelity may disagree with the Ninth Circuit's reasoning – or at least with its conclusion – the fact is that the only two Circuit Courts of Appeals to address the issue of "produced water" applied similar reasoning and achieved similar results. This Court's review is therefore unnecessary.

B. The Ninth Circuit's Decision Is Consistent with Both Lines of "Addition" Cases.

After determining that CBM wastewater was a pollutant, the Ninth Circuit addressed Fidelity's contention that "unaltered water" cannot be a pollutant. Pet. App. 13a-15a. It is in this context that the Ninth Circuit made the comment trumpeted by Fidelity as evidence that *Miccosukee* was key to this case. The Court of Appeals cited *Miccosukee*, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492-93 (2d Cir. 2001), and *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1299 (1st Cir. 1996), for the proposition that "transporting water from one water body to another can

violate the CWA." Pet. App. 14a. In each of these cases, water contaminated with one or more pollutants was removed from one water body and added to another water body, which did not have the same level of pollutants. In each case, the Circuit Courts of Appeal held that pollutants were "added" to the receiving water. Although the case herein did not involve any issue of "addition," it is consistent with this line of cases.

But more importantly, it is equally consistent with the second line of cases, known as the "dam cases." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). These cases hold that water moving through a dam is not "added" to the water below the dam. In *Gorsuch*, which involved water-quality changes induced by a dam, the D.C. Circuit held that no NPDES permit was required based upon judicial deference to EPA, which argued that pollutants must be introduced from "the outside world." *Gorsuch*, 693 F.2d at 165. EPA was given similar deference by the Sixth Circuit in *Consumers Power*, which involved moving water from Lake Michigan through a turbine and back into the lake. The turbine killed many fish; thus, the return flows to Lake Michigan were filled with dead fish. The Sixth Circuit held that the *transformation* of water by a point source is not an "addition" under the CWA, and is therefore not subject to NPDES permitting. *Consumers Power*, 862 F.2d at 585-86. As in *Gorsuch*, EPA argued that unless a pollutant is introduced from "the outside world," there is no "addition." *Id.* at 584-85.

In neither of the "dam cases" was the issue of "pollutant" addressed. The *Gorsuch* court observed that thermal changes are included in the CWA's definition of

"pollutant," but deferred to the EPA for fact-specific determinations on a case-by-case basis. 693 F.2d at 173-74 (quoting CWA sponsor Senator Muskie as saying, "Sometimes a particular kind of matter is a pollutant in one circumstance, and not in another."). The *Consumers Power* court similarly acknowledged that dead fish would be pollutants as "biological materials." 862 F.2d at 585. Nonetheless, the pivotal determination in both cases was that no pollutant had been added to waters of the United States from "the outside world" because nothing was added to the water; it was the same water, simply "transformed." Lacking any "addition" of a pollutant, both courts held the CWA did not apply.

Thus, the issue raised by these cases is what constitutes the "outside world." Whether this Court resolves the tension between these two lines of cases by defining the "outside world" historically (i.e., have the waterbodies ever been one), hydrologically (i.e., are they hydrologically connected), or legally (i.e., whether both waterbodies are waters of the United States), the case herein will be unaffected. CBM wastewater has no connection whatsoever to the surface waters into which it is being discharged. The groundwater being pumped from deep coalbed seams is wholly distinct from the surface water into which it is being discharged. Moreover, the groundwater is not a navigable water, while the Tongue River is. The "pollutant" – CBM wastewater – first enters the waters of the United States when it is discharged from the point source by Fidelity. Thus, there is no question that CBM wastewater is being added to the Tongue River and its tributaries from "the outside world," however that phrase is interpreted by this Court.

II. The Ninth Circuit's Decision Is Correct, And Does Not Merit Review.

The Ninth Circuit's decision not only presents no conflict with any other circuit, it is consistent with common rules of statutory interpretation as well as with the EPA's own determination in this case.

The Ninth Circuit held that CBM wastewater is a pollutant because it is "industrial waste," which it found encompassed "any useless byproduct derived from the commercial production and sale of goods and services." Pet. App. 10a. This holding is consistent with the Fifth Circuit's holding in *Cedar Point Oil*, which specifically noted that the wastewater from Cedar Point's oil production process was a pollutant both as "industrial waste" and as "chemical waste." 73 F.3d at 568. As industrial waste is explicitly listed as a pollutant in the Clean Water Act, no discharges of it may occur without a permit.

Not surprisingly, Fidelity contests this holding as an "expansive reading" of the term "industrial waste." Pet. 18. But statutory interpretation based upon the plain language of a statute is hardly novel jurisprudence. The Ninth Circuit's interpretation – which does not conflict with any other circuit court or with the EPA's determination in this case – merely applies plain-language definitions to the phrase "industrial waste." As noted by the Fifth Circuit, water is "the highest volume waste source in offshore oil and gas operations." *Id.* at 551. The same is certainly true for CBM operations. Thus, it seems wholly logical to describe a substance that is generated as the result of an industrial process and subsequently discarded as "industrial waste" – regardless of whether that substance is "natural water." The "natural" state of the water

is irrelevant for purposes of the CWA. If the receiving water has no historical, hydrological, or legal connection to the source water, then the source water is an "addition" to the receiving water. If the remaining four elements under the CWA are met, an NPDES permit is required before discharge.

A second basis for the Ninth Circuit's holding was that CBM wastewater is "produced water" that is not reinjected into state-approved wells, and therefore not exempt from the CWA. Pet. 10a. After listing several categories of pollutants, the Clean Water Act states that pollutant does *not* mean:

> (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. § 1362(6)(B). In other words, Congress chose to exempt from NPDES permitting the disposal of water "derived in association with oil or gas production" if it is disposed of in a well and meets other criteria. While CBM water is indisputably "derived in association with oil or gas production," Fidelity is not reinjecting any of it.[4]

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[4] It should be noted that Fidelity could reinject CBM water into state-approved wells, and would not be required to get an NPDES permit to do so. Moreover, *amici* would prefer this method of disposal.

The Fifth Circuit was compelled by this statutory exemption to note that the exclusion of produced water in certain circumstances was "a strong indicator of Congress's concern over the effects of produced water on the environment." 73 F.3d at 568. Moreover, noted the Fifth Circuit, "If, absent an exemption, produced water reinjected into a state-approved well is a pollutant, then it is hardly a stretch to say that produced water deposited directly into a bay is also a pollutant." *Id.* The Ninth Circuit found this logic compelling. Pet. 11a ("The CWA only exempts water derived from gas extraction from regulation when the water is disposed of in a well and will not result in the degradation of other water bodies.").

Fidelity argued to the Ninth Circuit, as it did in its petition, that "produced water" must have chemicals added to it. Pet. 20, 10a. Once again applying commonly accepted rules of administrative law, however, the Ninth Circuit looked to EPA's definition of "produced water," which clearly does not require the addition of chemicals:

> *Produced water* means the water (brine) brought up from the hydrocarbon-bearing strata during the extraction of oil and gas, and *can* include formation water, injection water, and any chemicals added downhole or during the oil/water separation process.

40 C.F.R. § 435.41(bb), 40 C.F.R. § 435.11(bb) (emphasis added); *see also* 40 C.F.R. § 63.761, 40 C.F.R. § 68.3 (Clean Air Act) ("*Produced water* means water that is extracted from the earth from an oil or natural gas production well, or that is separated from crude oil, condensate, or natural gas after extraction."). In other words, water that is pumped from underground coal seams during the extraction of natural gas is produced water, regardless of

whether chemicals have been added to it. Moreover, the EPA's reference to produced water as brine implicitly recognizes that water from "the hydrocarbon-bearing strata" is salty – and for irrigators who depend upon fresh water, salt is anathema.

Simply put, the Ninth Circuit's opinion broke no new legal ground. It is consistent with other circuits' approach to statutory interpretation under the Clean Water Act. Most importantly, the holding – that CBM wastewater is a "pollutant" under the CWA – in no way rests upon this Court's ultimate holding in *Miccosukee*. Regardless of how this Court defines "the outside world" for purposes of the Clean Water Act, the decision of the lower court will be unaffected. Whether this Court adopts the *Miccosukee-Dubois* line of reasoning or the *Gorsuch-Consumers Power* line, coalbed seams are unquestionably "the outside world" to the Tongue River.

CONCLUSION

For the foregoing reasons, *amici* Irrigators respectfully request that the petition be denied.

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